**APPENDIX A**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 29 1998
THOMAS K. KAHN
CLERK

No. 98-6248
Non-Argument Calendar

D. C. Docket No. CV-96-AR-2797-S

ANDREW K. KIM,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, The University of Alabama School of Medicine; HAROLD J. FALLON, M.D., et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

(December 29, 1998)

Before TJOFLAT, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Andrew K. Kim appeals the district court's grant of summary judgment for the Board of Trustees of the University of Alabama (the "University"). The sole issue on appeal is whether the district court properly determined that there was no genuine issue of material fact regarding Kim's 42 U.S.C. § 1983 claim that the University denied him procedural and substantive due process when it dismissed him from enrollment at the University of Alabama School of Medicine ("UASOM").

Kim originally enrolled at UASOM in July 1991. From May 1993 to January 1994, he sought, and was granted, a leave of absence from UASOM due to personal reasons. He returned in January 1994 and finished his second year of medical school, but felt unprepared to take Step One of the United States Medical Licensing Examination ("USMLE Step One"), which is required for medical students to advance to the third year of medical school. He planned to take USMLE Step One in September 1994 instead, but was unable to do so because of depression over certain family problems. Kim then received a second leave of absence from UASOM which was retroactive to June 1994 and continued until June 1995. The associate dean who granted this second leave of absence emphasized that Kim was expected to take the USMLE Step One in June 1995. However, Kim failed to return to Birmingham in June 1995 to take the USMLE Step One. In a letter to UASOM administrators, Kim indicated that he would sit for the test in September 1995. UASOM informed Kim in response that the September 1995 USMLE Step One would be his last chance to take the exam. Kim did not take the September 1995 exam, but instead requested permission to repeat his second year of school. He was granted permission to retake a course and audit other courses. In June 1996, however, due to further personal problems, Kim once again failed to take the USMLE Step One, this time without notifying UASOM officials of his withdrawal from the June 1996

exam. This was the fifth exam that Kim missed, and three years had passed since the normal time for taking the USMLE Step One. UASOM officials then terminated Kim as a medical student, giving him two appeal opportunities in the process.

This Court applies a de novo standard of review to a district court's grant of summary judgment. See, e.g., Scala v. City of Winter Park, 116 F.3d 1396, 1398 (11th Cir. 1997). Summary judgment is appropriate if the record shows no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See, e.g., Eberhardt v. Waters, 901 F.2d 1578, 1580 (11th Cir. 1990). "All evidence and reasonable factual inferences drawn therefrom are reviewed in the light most favorable to the party opposing the [summary judgment] motion." Warren v. Crawford, 927 F.2d 559, 561-62 (11th Cir. 1991).

Under the Fourteenth Amendment Kim was entitled to a certain minimal level of procedural due process before he could be dismissed from medical school. Board of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 82, 98 S. Ct. 948, 951, 55 L.Ed.2d 124 (1978); Haberle v. University of Alabama at Birmingham, 803 F.2d 1536, 1539 (11th Cir. 1986). This procedural due process includes as its basic elements notice and an opportunity to be heard. Horowitz, 435 U.S. at 85-86, 98 S. Ct. at 952-53. However, in certain circumstances a mere "informal give-and-take" may satisfy this requirement. Id.

In the instant case, Kim was given the constitutionally required notice and opportunity to be heard. Kim was allowed to appeal to Dr. Nelson, Associate Dean of Students, and then to Dr. Fallon, Dean of UASOM. He admitted in his deposition that he believed Dr. Fallon had listened to his explanation of the circumstances surrounding his failure to sit for the USMLE Step One. Procedural due process requires nothing more. See Haberle, 803 F.2d at 1539 ("The fact that the procedures used were ad hoc does not violate the Horowitz stan-

dard; no formal hearing is required."). Kim points to minor discrepancies between the appeal procedure outlined in the student manual and the procedure that was actually provided in his case.[1] The district court did not err in crediting the University's explanation that these minor departures were warranted because Kim's dismissal was a hybrid case (involving aspects of both academic and disciplinary dismissal) and did not fit the type of dismissal for which initiation by the promotions committee would be warranted. At any rate, regardless of slight variations, Kim received the notice and informal discussion to which he was entitled, in the form of meetings with Drs. Nelson and Fallon.

Kim argues also that his dismissal from UASOM was so arbitrary as to violate substantive due process rights under Regents of the University of Michigan v. Ewing, 474 U.S. 214, 106 S. Ct. 507, 88 L.Ed.2d 523 (1985). Ewing assumed arguendo a substantive right under the Due Process Clause with respect to academic decisions that are "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Id. at 225, 106 S. Ct. at 513. Such challenges, however, provide only a "narrow avenue for judicial review," id. at 226, 106 S. Ct. at 514, and the judgment of university decisionmakers will be respected unless it is "beyond the pale of reasoned academic decision-making," id. at 227-28, 106 S. Ct. at 514-15. Kim had failed to sit for the USMLE Step One five times in a row, in clear contravention of UASOM policy. Under these circumstances, the dis-

---

[1] The UASOM handbook stated that a student who suffers adverse action by a three-member promotions committee may appeal the committee's action by filing a timely notice of his intent to appeal. The appeal is heard first by the Associate Dean for Undergraduate Medical Education, and then by the Dean. In the instant case, the initial decision to dismiss Kim was made not by the promotions committee but by Dr. Nelson, Associate Dean of Students, who then presented her decision to the promotions committee and had it ratified by them.

trict court properly concluded that the University was entitled to summary judgment on the assumed substantive due process claim as well as on the procedural due process claim. Cf. Haberle, 803 F.2d at 1539-41 (holding that when a university dismissed a Ph.D student for failing to take a prerequisite qualifying exam, there "was not such a substantial departure from academic norms as to amount to an arbitrary deprivation of property").

AFFIRMED.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | |
|---|---|
| ANDREW W. KIM,<br><br>Plaintiff<br><br>vs.<br><br>THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, the UNIVERSITY OF ALABAMA SCHOOL OF MEDICINE, HAROLD J. FALLON, M.D., and KATHLEEN G. NELSON, M.D.,<br><br>Defendants | CIVIL ACTION NO.<br><br>CV-96-AR-2797-S<br><br>FILED<br>98 MAR 12 PM 3:39<br>U.S. DISTRICT COURT<br>N.D. OF ALABAMA |

**MEMORANDUM OPINION**

Presently before the court is a motion for summary judgment made by the defendants, The Board of Trustees of the University of Alabama for its division, the University of Alabama School of Medicine ("UASOM" or "UAB"), Harold J. Fallon, M.D. ("Fallon"), and Kathleen G. Nelson, M.D. ("Nelson"). Plaintiff Andrew W. Kim ("Kim") sues the defendants alleging that they expelled him from the medical school in violation of his Fourteenth Amendment right to due process, and his right to be free from both racial discrimination, 42 U.S.C. §§ 1981, 1983, and disability discrimination, 42 U.S.C. § 12101. Because there is no dispute as to any genuine issues of material fact, summary judgment for defendants is appropriate.

## I. FACTS[1]

Andrew Kim is a Korean born naturalized citizen who attended the University of Alabama Medical School. Kim enrolled in July 1991 and performed satisfactorily. By the spring of 1992, however, Kim sought counseling for depression which had been precipitated by his brother's death. On May 18, 1993, Kim requested, and was granted, a leave of absence from UAB. The leave of absence was effective from April 16, 1993 through January 1994. While on leave, the wife of the deceased brother committed suicide, but Kim returned to UAB in January 1994 and finished his second year.

In order to advance to the third year of medical school at UAB, and most American medical schools, a medical student must pass Part One of the United States Medical Licensing Examination ("USMLE"). This examination is offered yearly, in June and in September.

After returning from his leave of absence, in January 1994, and completing his second year, Kim felt unprepared for the June 1994 USMLE. Def.'s Ex. 13 ("I did not take the USMLE, Step 1. Perhaps I did not give it my best effort or studied at too slow pace [sic]. On the day before the exam I still felt that I would not be successful on the first attempt. I apologize for my action and hope that I did not violate school rules."). Therefore he notified the appropriate medical school official and indicated that he would try to take the September 1994 examination. Because of his depression, however, he was unable to take the September 1994 examination.

---

[1] The facts are presented in the light most favorable to the plaintiff. *Swint v. City of Wadley*, 51 F.3d 988, 995 (11th Cir. 1995). The court notes, however, that neither party bothered to support its summary of facts with citations to the record.

In early October, Associate Dean C.W. Scott, Jr. ("Scott"), informed Kim by letter that his failure to take the two 1994 examinations would be considered a withdrawal from the medical school, unless Kim contacted Scott by a specified date with an acceptable explanation. Def.'s Ex. 2. Kim met with Scott in a timely manner and explained his family problems. Scott granted Kim a second leave of absence which was retroactive to June 1994 and continued until June 1995. Def.'s Ex. 3. Scott emphasized, however, that Kim was expected to take the June 1995 USMLE. *Id.*

On May 30, 1995, Kim sent a letter to UAB indicating that he would not be able to return to Birmingham in sufficient time to study for the June examination, but that he would sit for the test in September. Def.'s Ex. 4. The letter did not arrive until June 16, 1995. At this point, Kim had failed to sit for the USMLE on three occasions since returning from his second [sic] leave of absence: June 1994, September 1994, and June 1995. The UASCM student handbook provides that a second year student has three opportunities to pass the examination. Def.'s Ex. 1, at p. 64. When Kim returned to campus after missing the June 1995 examination, he met with defendant, Kathleen G. Nelson ("Nelson"), who was the new Associate Dean, replacing Dr. Scott. Nelson insisted that Kim register for the September USMLE. Nelson also sent Kim a letter indicating that the September 1995 s[i]tting would be his last opportunity to take the exam. Def.'s Ex. 5. Kim insists, however, that he did not receive this letter.

Although Kim registered for the examination, he did not take the September USMLE. Instead he requested permission to repeat his second year of school. Kim believed this would more adequately prepare him for the June 1996 examination. Nelson granted his request and allowed Kim to re-take a course and audit several additional courses.

During the academic year, however, he became romantically involved with a woman who threatened him after the relationship ended. The woman and her mother carried

through with these threats by fabricating a story and sharing it with medical school personnel. The women claimed that Kim had kidnapped the former girlfriend and committed other sordid acts. As a result of these allegations Nelson met with Kim and advised him to stay [a]way from the women. Kim then filed charges against the women with the Birmingham police department. He shared a copy of this report with Nelson who subsequently shared the report with defendant, Dr. Fallon, and an instructor in the undergraduate department where the former girlfriend was enrolled. The undergraduate instructor discussed the report with the former girlfriend and the threats from the woman increased. Eventually, Kim complained to UAS police about the women and the harassment stopped.

As a result of these events, Kim was unprepared for the June 1996 USMLE. "Knowing that the student catalogue provided three chances to take the USMLE examinations, he contacted the National Board on June 8, 1996, that he was withdrawing from the June exam." Pl.'s Br. at p. 4. Because he was embarrassed, Kim did not inform Nelson of his failure to sit for the examination. Nine days after he notified the National Board, Nelson sent a letter to Kim terminating him as a medical student for failing to take the USMLE. Def.'s Ex. 7. This was the fifth examination that Kim missed.

Kim immediately requested reinstatement and/or an opportunity to appeal Nelson's decision. Nelson initially denied Kim's request and refused to allow Kim to obtain a copy of his medical school records. Nelson also suggested, on more than one occasion, that Kim attempt to transfer to a medical school in Korea or one of the historically African-American medical schools, such as Meharry or Morehouse. Kim testified that Nelson often used the phrase, "the three M's, Meharry, Morehouse, and minority." Kim Dep., at 115. Kim also alleges that Nelson described him as too polite and too passive. *Id.* at 115. Finally Nelson stated that Kim would not

make a good medical doctor and that he needed further psychiatric help to overcome his depression. *Id.* at 117.

Following the academic dismissal appeal procedures found in the student handbook, Kim filed a formal notice of appeal in which he requested a hearing before the Associate Dean for Undergraduate Medical Education, Dr. Boulware. UAB denied Kim's request, but did permit Kim to meet first with Dr. Nelson and later with Dean Fallon. In his brief, filed in opposition to UASOM's motion for summary judgment, Kim contends that Fallon did not allow Kim to rebut any information Nelson may have provided. In his deposition, however, Kim admitted that he believed Fallon had listened to what Kim had to say about the circumstances surrounding his failure to sit for the USMLE. Kim Dep., at 101. On July 5, 1996, Fallon denied Kim's request for reinstatement. Kim filed the present lawsuit on October 24, 1996.

## II. SUMMARY JUDGMENT STANDARD

Under the Federal Rules of Civil Procedure, summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." F.R.Civ.P. 56(c).

## III. § 1981 & § 1983 CLAIMS ASSERTED AGAINST STATE ENTITY UASOM

Defendant UASOM first asserts that, pursuant to the Eleventh Amend nent of the Constitution of the United States, it is immune from Kim's § 1981 and § 1983 claims. UASOM's assertion is correct. The Eleventh Circuit has unequivocally held that state entities are immune from both § 1981 and § 1983 suits. *Harden v. Adams,* 760 F.2d 1158, 1163 (11th Cir. 1985) (discussing Section 1983); *Sessions v. Rusk State Hospital,* 648 F.2d 1066, 1068 (5th Cir. 1981) (discussing Section 1981). Similarly there is no doubt that Alabama state universities are entities for purposes of Eleventh Amendment immunity. *Harden*, 760 F.2d at 1163.

Consequently, UASOM is entitled to summary judgment on Kim's § 1981 and § 1983 claims.

If UASOM did not enjoy absolute immunity, it would not be liable for the reasons which follow in analyzing the § 1981 and § 1983 claims against the individual defendants.

## IV. § 1981 & § 1983 RACE DISCRIMINATION CLAIMS ASSERTED AGAINST THE INDIVIDUAL DEFENDANTS

Kim argues that the issue of whether his expulsion was motivated by racial animus constitutes "a fact which should be decided by a jury." Pl.'s. Br. at 7. In support of this argument he points to Nelson's comment regarding transfer to a Korean medical school or one of the "three M's, Meharry, Morehouse and minority." Kim Dep., at 115, 117. Kim also claims that Nelson's description of him, as too polite and too passive, was racially derogatory. *Id.* Finally, Kim asserts, via his own affidavit, that discriminatory remarks by Nelson also precipitated the expulsion of another Korean medical student. Kim Aff. (Doc 19), at ¶5. Beyond this, Kim produces no other evidence to support his § 1981 and § 1983 claims.

Kim may make out his prima facie case for disparate treatment: (1) by producing direct evidence of discrimination, (2) by meeting the McDonnell Douglas[] circumstantial evidence framework, or (3) by demonstrating a pattern of discrimination using statistical data.[2] *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990).

---

[2] "The Supreme Court has held that the test for intentional discrimination in suits under § 1981 is the same as the formulation used in Title VII discriminatory treatment causes." *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 949 (11th Cir. 1991), *cert. denied*, 502 U.S. 1058, 112 S. Ct. 935 (1992). The Title VII paradigm also applies to § 1983 cases because "[t]he section 1981 claim has been effectively merged into the section 1983 claim for racial discrimination." *Busby v. City of Orlando*, 931 F.2d 764, 771 (11th Cir. 1991).

**A. Direct Evidence**

Presumably, Kim contends that Nelson's comments constitute direct evidence and therefore he has made out a prima facie case of racial discrimination. Direct evidence is "evidence, which if believed, proves the existence of the fact in issue without inference or presumption." *Carter v. Three Springs Residential Treatment,* 132 F.3d 635, 641 (11th Cir. 1998) (citations omitted & emphasis supplied). Consistent with this definition, any statements that Kim seeks to introduce as direct evidence must directly relate to Nelson's decision to dismiss him. *See id.* at 642. If Kim cannot show such a connection, between the comments and the dismissal, this court can only consider the comments as indirect evidence. *See Burrell v. Board of Trustees of Georgia Military College,* 125 F.3d 1390, 1393 (11th Cir. 1997).

Nelson's comments do not constitute direct evidence. Although such comments are distasteful, there is no evidence that her decision to dismiss Kim was motivated by racial animus. It is clear that Kim failed to meet the objective requirements for continued enrollment in the medical school program; therefore, this court cannot infer or presume that Nelson was motivated by racial animus when she expelled Kim. "Direct evidence, by definition, is evidence that does not require such an inferential leap between fact and conclusion." *Carter,* 132 F.3d at 642.

Moreover, the record indicates that, until Kim failed to sit for his fifth USMLE, Nelson may have treated Kim more favorably than other students. Kim was aware that he was expected to sit for the June 1995 USMLE after he returned from his second leave of absence in January 1995. When he failed to take both the June and September examinations, Nelson allowed Kim to re-take and/or audit several classes rather than dismiss him from the program. However, Kim then failed to sit for the June 1996. Now he complains that the same dean who allowed him to remain in the program for an additional year, despite his failure to sit for even one exami-

nation, held discriminatory attitudes which affected her decision to dismiss him from the program.

Even it this court were to assume Nelson held racially discriminatory attitudes, she was not the ultimate decision maker. Therefore her statements could not constitute direct evidence. *See LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1412 (7th Cir. 1984) (cited with approval in *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987)). Dr. Fallon, the Dean of the Medical School, ratified Nelson's decision to dismiss Kim. There is certainly no evidence in the record that would even remotely suggest that Dr. Fallon, the ultimate decision maker, maintained racial animus when he affirmed Nelson's decision. Moreover, Fallon only affirmed Nelson's decision after personally hearing Kim's explanation for his failure to take the USMLE. Because Dean Fallon was the ultimate decision maker with the authority to overrule Nelson's decision, "the relevant inquiry" is into the motivation of Dr. Fallon. *See LaMontagne*, 750 F.2d at 1412. Therefore, any "chain of inference" from Nelson's comments to the decision by Dr. Fallon to uphold the dismissal, "would be sheer speculation." *See id.* Consequently, Nelson's comments do not constitute direct evidence of discrimination.

**B. Indirect Evidence**

Without direct evidence of discrimination, Kim must proceed, if at all, under the McDonnell Douglas indirect evidence framework by showing that: (1) he was a member of a protected group, (2) he was qualified, (3) he suffered adverse action at the hands of the individual defendants, and (4) he was dismissed "under circumstances that give rise to an inference of discrimination." *See Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 559 (11th Cir. 1997). If Kim can make out a prima facie case under the McDonnell Douglas framework, then the burden of production (not the burden of persuasion) shifts to UASOM to come forward with a legitimate non-discriminatory reason for the dismissal. *See Trotter v.*

*Board of Trustees of University of Alabama*, 91 F.3d 1449, 1454-55 (11th Cir. 1996). If UASOM can supply such a reason, the burden shifts back to Kim to produce admissible evidence from which a jury might find that UASOM's proffered reason is pretextual. *See id.*

Kim is unable to make out a prima facie case under the McDonnell Douglas[] indirect evidence framework because he cannot show that he was qualified to remain in the program. Continued enrollment, beyond the second year of the program, requires a passing score on the USMLE. The student handbook provides, however, that the student has three opportunities to obtain a passing score. Kim failed to obtain a passing score after five examinations: two 1994 examinations, two 1995 examinations and the June 1996 examination. Even if this court were to overlook his failure to take the two 1994 examinations, because he was granted a retroactive leave of absence for that time period, Kim still was allowed three additional examination opportunities to pass without even sitting for the USMLE. Because he failed to meet the requirements for continued enrollment, he is not "qualified" and cannot make out a prima facie for discrimination. [sic] His personal and emotional problems do not alleviate his duty, pursuant to the McDonnell Douglas[] paradigm, to establish that he was qualified to remain in the program.

Even if Kim could make out a prima fac[i]e case, his race discrimination claims fail because he is unable to produce any evidence from which a jury might find that UASOM's proffered nondiscriminatory reason for the dismissal is pretextual. Kim cannot create pre-text out of thin air by citing his own affidavit regarding the alleged discriminatory treatment of another Asian UASOM student. In the affidavit, Kim affirmed that he spoke with the mother of the other Asian student. Kim Aff. (Doc. 19), at ¶5. Apparently, the mother told Kim that UASOM dismissed her son in his fourth year of medical school and that Nelson had made disparaging re-

marks to the son regarding Asians. *Id.* This double hearsay is inadmissible. Fed. R. Evid. 801.

Even if such evidence were admissible, the mother's conclusory allegation, that UASOM dismissed her son because of his race, is not enough to support a finding of pretext. Consequently, summary judgment is appropriate for the individual defendants on Kim's § 1981 and § 1983 race discrimination claims.

**VI. [sic] FOURTEENTH AMENDMENT DUE PROCESS CLAIMS**

Kim is unable to complain that UASOM violated his due process rights by refusing to allow him an opportunity to be heard, as required under the Due Process [C]lause of the Fourteenth Amendment to the United States Constitution. He does not dispute that Dr. Nelson, the Associate Dean of Students heard his first appeal. Kim Dep., at 98. Nor does Kim dispute that Dr. Fallon, the Dean of the Medical School, then heard Kim's second appeal. Kim Dep., at 99-101.

Rather than the inability to be heard, Kim complains that UASOM violated his procedural due process rights when it prevented him from utilizing the appeal process available to other students. Specifically, Kim complains that UASOM denied him an opportunity to take advantage of the appeal procedure described in the student handbook as well as the actual appeal procedure UASOM utilizes, but never memorialized.

The student handbook provides that a student who is dismissed from the medical school or suffers adverse action by the promotions committee, may appeal the committee's action by filing a timely notice of his intent to appeal. Student Handbook, Def's. Ex. 1, at p. 63. First and second year students "appeal first to the Associate Dean for Undergraduate Medical Education of the School of Medicine," in this instance Dr. Boulware. *Id.* at p. 64. If the Associate Dean denies the appeal, the student may then appeal to the Dean of

the School of Medicine, Dr. Fallon. *Id.* "The decision of the Dean will be final. No further appeal is offered by the School of Medicine. Academic appeal hearings are not legal proceedings. They constitutes an opportunity for the student to be heard by an academic administrative official of the School of Medicine." *Id.* (emphasis supplied).

However, Dr. Nelson testified that UASOM actually uses an appeal procedure that differs from the one described in the student handbook. A three person panel, not solely Dr. Boulware, hears a student's first appeal in academic dismissal cases. Nelson Dep., at 103-106. However, Nelson did not utilize an appeal panel in Kim's case for two reasons. First, both Nelson and the promotions committee (which certifies each student to progress to the next level of the program) agreed that Kim's expulsion was "administrative," rather than "academic." Nelson Dep., at 113-14. Second, Nelson, not the promotions committee, made the initial decision to dismiss Kim. The appeal panel, according to Nelson, is only available for "academic" dismissals that are carried out by the promotions committee. *Id.*

"To be entitled to the procedural protections of the Fourteenth Amendment, [Kim must first] demonstrate that [his] dismissal from the school deprived (him) of either a 'liberty' or a 'property' interest." *Board of Curators of Univ. of Missouri v. Horowitz,* 435 U.S. 78, 82, 98 S. Ct. 948, 951 (1978). The United States Supreme Court assumes that a liberty or property interest exists in school dismissal cases. *See e.g., Horowitz,* 435 U.S. at 84-85, 98 S. Ct. at 952. Therefore, Kim meets the initial hurdle for asserting a due process claim.

Next, Kim must produce evidence that UASOM failed to meet minimum due process standards when it dismissed him. In the "landmark" case of *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, *cert. denied*, 368 U.S. 930, 82 S. Ct. 368

(1961), the former Fifth Circuit[3] recognized that students facing expulsion from a tax-supported educational institution[] are entitled to the protections of the due process clause. *G[]oss v. Lopez,* 419 U.S. 565, 576, 95 S. Ct. 729, 737 (1975). Specifically, such students are entitled to notice and an opportunity to be heard. *Horowitz,* 435 U.S. at 85-86, 98 S. Ct. at 952-53. (citations omitted). However, clarified the court, the opportunity to be heard need only be in the form of an "informal give-and-take." *Id.*

The Fifth Circuit further clarified the due process standards, by noting that the *Dixon* requirements are limited to "disciplinary" expulsions. *Mahavongsanan v. Hall,* 529 F.2d 448, 449 (5th Cir. 1976).

> Misconduct and failure to attain a standard of scholarship cannot be equated. A hearing may be required to determine charges of misconduct, but a hearing may be useless or harmful in finding out the truth concerning scholarship. There is a clear dichotomy between a student's due process rights in disciplinary dismissals and in academic dismissals.

*Id.* at 450.

In *University of Missouri v. Horowitz,* the United States Supreme [C]ourt ratified the Fifth Circuit's analysis by recognizing that there is a "significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal." 435 U.S. at 86, 98 S. Ct. at 953. Accordingly, concluded the Supreme Court, "a hearing is not required by the Due Process Clause of the Fourteenth Amendment." *Id.* at 86 n.3, 98 S. Ct. at 953 n.3. Due process

---

[3] The Eleventh Circuit has adopted as precedent all Fifth Circuit Court of Appeals cases decided prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

merely requires that school officials engage in a "careful and deliberate" "decision-making process" before expelling a student for academic reasons. *Haberle v. University of Alabama in Birmingham,* 803 F.2d 1536, 1539 (11th Cir. 1986) (citing *Horowitz*, 435 U.S. at 85, 98 S. Ct. at 952)).

Applying the "careful and deliberate" test, Kim's procedural due process claim cannot survive summary judgment. He has produced no evidence which would indicate that UASOM's decision to expel him was reached without care and deliberation. Although Nelson alone made the original dismissal decision, the promotions committee not only ratified her decision, but also agreed that Kim's dismissal was not academic and therefore he was not entitled to utilize the three person panel. Nelson Dep., at 113-14. UASOM then allowed Kim two opportunities to be heard. Kim first appealed to Dr. Nelson and then to Dr. Fallon, the Dean of the medical school. Nelson Dep., at 115. Finally, all of the decision makers were aware of Kim's personal and medical school history. *See id.*

Thus, not only did UASOM met the constitutionally mandated procedural due process requirements for academic dismissals, by making a careful and deliberate decision, but UASOM also met the due process requirements for disciplinary dismissals, by allowing Kim an opportunity to he heard. Indeed, UASOM exceed the minimum requirements of due process by allowing Kim two opportunities to be heard. Whether or not UASOM followed [its] normal appeal procedures is irrelevant for purposes of procedural due process. "The fact that the procedures used were ad hoc does not violate the Horowitz standard; no formal hearing is required." *Haberle*, 803 F.2d at 1539.

Nonetheless, UASOM's failure to follow its standard appeal procedures is not wholly irrelevant. Failing to follow established dismissal procedures does subject the decision maker to a substantive due process challenge. Such challenges, however, only provide a "narrow avenue for judicial

review." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 227, 106 S. Ct. 507, 514 (1985).

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

*Haberle*, 803 F.2d at 1539 (emphasis supplied) (citing *Ewing*, 474 U.S. 214, 106 S. Ct. 507).

This narrow avenue for judicial review was utilized in *University of Michigan v. Ewing*, where the defendant medical school dismissed the plaintiff, a second year medical student, after he experienced academic difficulties and failed to obtain an acceptable score on his national board examination. 474 U.S. 214, 106 S. Ct. 507. Because Ewing, like Kim, could only advance to his third year if he obtained a satisfactory score on the national board test, the University expelled him after he scored the lowest in the program's history. When the University refused to allow him to retake the examination, Ewing sued, contending, *inter alia*, that his due process rights were violated because the medical school denied him the procedure available to other students: namely, the opportunity to re-take the examination. The United States Supreme Court found that the University did not violate Ewing's substantive due process rights by refusing his request to re-take the examination. "[W]hen viewed against the backdrop of his entire career at the University...," the Supreme [C]ourt found that Ewing's dismissal "rested on academic judgment that [was] not beyond the pale of reasoned academic decision-making." *Ewing*, 414 U.S. at 227-28, 106 S. Ct. at 514-15. Therefore, the uiniversity's departure from its normal procedure of allowing retakes was not fatal. See *id.* Further, noted the [C]ourt, there was no evidence that the

facts of Ewing's case made him similarly situated to those students who had been allowed to re-take the national board examination. *Id.* at 228 n.14, 106 S. Ct. at 515 n.14. Consequently, Ewing's termination did not "substantially deviate from accepted academic norms when compared with [the defendants'] treatment of other students." *Id.*

Given the circumstances in the case presently before the court, UASOM's decision, like the decision in *Ewing,* was not "beyond the pale of reasoned academic decision-making." *See id.* at 227-28, 106 S. Ct. at 514-15. Kim had five opportunities to take the national board exam (two more opportunities than other students), but he had failed to sit for a single exam. Kim was well aware that continued enrollment in the program was conditioned upon a passing examination score and that UASOM required its medial school students to obtain a passing score within three examinations. Kim did not take the examination within the required time frame. "Therefore, he is not entitled to continue to pursue the [degree]. There is nothing arbitrary about such a requirement." *Haberle*, 803 F.2d at 1541. While UASOM had been very understanding of Kim's personal crises in the past, it was under no obligation to further excuse him from the program requirements.

Moreover, like Ewing, Kim cannot produce evidence that there were other similarly situated students who were treated more favorably. Consequently, this court has no comparators against which to evaluate UASOM's decision. Without such comparators and given Kim's repeated failure to meet UASOM's requirements for continued enrollment, Kim cannot show that UASOM's decision was arbitrary or that the medical school failed to exercise "professional judgment." *See Haberle,* 803 F.2d at 1539. Thus summary judgment for the defendants will be granted on Kim's procedural and substantive due process claims.

## VI. AMERICANS WITH DISABILITIES ACT ("ADA") CLAIMS

### A. ADA Claims Asserted Against The Individual Defendants

Both Dr. Nelson and Dr. Fallon correctly assert that they are improper defendants inasmuch as Kim asserts ADA claims against them in their individual or official capacities. The ADA "does not provide for individual liability, only for employer liability." *Mason v. Stallings,* 82 F.3d 1007, 1009 (11th Cir. 1996). Therefore, the court will grant summary judgment to Nelson and Fallon on Kim's ADA claim.

### B. ADA Claims Asserted Against UASOM

When the current motion for summary judgment came under submission, UASOM did not have the benefit of this court's January 13, 1998, opinion in *Garrett v. Board of Trustees of the Univ. of Alabama in Birmingham,* CV-97-AR-0092-S. Accordingly, UASOM did not raise an Eleventh Amendment Immunity defense in response to Kim's ADA claim. Consistent with the *Garrett* decision, the court holds that UASOM is immune from suit under the ADA and is therefore entitled to summary judgment on said claim.

Even if UASOM were not entitled to Eleventh Amendment immunity, Kim's ADA claim could not survive. To establish a prima facie case for disability discrimination Kim must show that: (1) he has a disability;[4] (2) he is a qualified individual; and (3) he was subjected to unlawful discrimination because of his disability. *Holbrook v. City of Alpharetta,*

---

[4] The ADA defines a disability as: "a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; B) a record of such impairment; or C) being regarded as having such an impairment." 42 U.S.C. § 12101(2). Kim asserts that he is disabled for purposes of the ADA because UASOM regarded him as having an impairment. Although UASOM contends that Kim does not meet any ADA definition of disability, the court assumes that Kim is disabled fur purposes of this motion for summary judgment.

112 F.3d 1522, 1526 (11th Cir. 1997) (citations omitted). A qualified individual with a disability is one who can "perform the essential functions as a [UAB] medical student despite his disability or with a reasonable accommodation for his disability." *Ellis v. Morehouse School of Medicine*, 925 F. Supp. 1529, 1540 (N.D. Ga. 1996).

Kim is unable to make out a prima facie case for disability discrimination because he cannot show that he is a qualified individual with a disability. As discussed in this court's analysis of his race discrimination claim, Kim failed to meet the objective criteria for continued enrollment in the medical school, by failing to obtain a passing [s]core on the USMLE within the requisite number of examinations. Consequently, Kim is not qualified to remain in the program and therefore cannot make out a prima facie case for disability discrimination.

Second, Kim's prima facie case fails because he is unable to produce evidence that his dismissal was based upon his disability. Nelson's comments regarding Kim needing psychiatric help do not establish improper motive. There is no evidence which might even remotely suggest that an improper motive entered into the ultimate decision made by Dean Fallon to affirm Kim's dismissal. Kim simply did not meet the program requirements.

Finally, even if Kim could make out a prima facie case of disability discrimination he still could not survive summary judgment. Although UASOM had a duty to provide reasonable accommodations that would have enabled Kim to meet the requirements of the program, the court determines, as a matter of law, that UASOM fulfilled this duty. "[T]he point is not whether a medical school is 'right' or 'wrong' in making program-related decisions." *Wynne v. Tufts Univ. School of Medicine,* No. Civ.A. 88-1105-Z, 1992 WL 46077 (D. Mass. 1992), *aff'd*, 976 F.2d 791, 795 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030, 113 S. Ct. 1845 (1993). This court can only review the expulsion "to determine if [Kim] presents

evidence that [UASOM's] decision to dismiss him was so arbitrary or irrational as to not constitute an exercise of professional judgment." *See Ellis,* 925 F. Supp. at 1543, 1541-[4]2 (applying the deferential due process standard in academic dismissal cases where the plaintiff alleges discrimination). "That [UASOM] could have provided a different set of reasonable accommodations or more accommodations does not establish that the accommodations provided were unreasonable or that the additional accommodations were necessary." *Wynne,* 1992 WL 46077, at *1.

There is nothing in the record to suggest that UASOM's dismissal of Kim was "so arbitrary or irrational as to not constitute an exercise of professional judgment." *See Ellis,* 925 F. Supp. at 1543. UASOM more than reasonably accommodated Kim's disability for several years. It granted Kim a retroactive leave of absence, excused Kim's failure to sit for the two 1994 examinations and allowed him three more opportunities to take the USMLE. However, Kim exhausted his three additional opportunities without even sitting for the examination. UASOM was under no duty to further excuse him from the essential requirements of the program. *See id.* at 1547 (noting that the defendant "is only required to accommodate [the plaintiff] to the extent that such accommodation would not fundamentally alter the nature of its program") (citing *Southeastern Community College v. Davis,* 442 U.S. 397, 409, 99 S. Ct. 2361, 2368-69 (1979)). Therefore, like his other claims, his ADA claim also fails.

**VII. Conclusion**

Because no genuine issues of material fact are in dispute, the defendants are entitled to summary judgment on all claims asserted by Kim.

DONE this 12th day of March, 1998.

/s/ William M. Acker
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

**APPENDIX C**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 28 1999
THOMAS K. KAHN
CLERK

No. 98-6248

ANDREW K. KIM,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, The University of Alabama School of Medicine; HAROLD J. FALLON, M. D., et al.,

Defendants-Appellees.

---

On Appeal from the United States District Court for the Northern District of Alabama

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d ____).

Before: TJOFLAT, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [illegible]
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)